

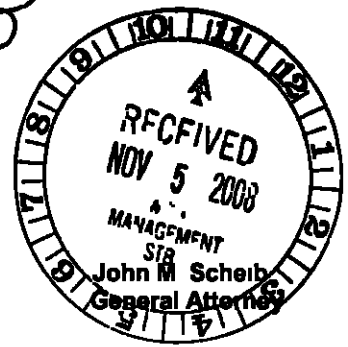


Norfolk Southern Corporation
Law Department
Three Commercial Place
Norfolk, Virginia 23510-9241

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FILED

NOV 4 - 2008

**SURFACE
TRANSPORTATION BOARD**



Writer's Direct Dial Number

(757) 629-2831
(757) 629-2607 (Fax)
john.scheib@nscorp.com

November 4, 2008

BY ELECTRONIC FILING AND FEDERAL EXPRESS

Acting Secretary Anne K. Quinlan
Surface Transportation Board
395 E Street, S.W.
Washington, DC 20024

FEE RECEIVED

NOV 4 - 2008

**SURFACE
TRANSPORTATION BOARD**

Re STB Finance Docket No. 35196 Petition for Declaratory Order on Referral from the United States District Court for the Northern District of Alabama

Dear Acting Secretary Quinlan:

Enclosed for filing is Norfolk Southern Railway Company's petition for a declaratory order in the above captioned proceeding. The filing fee of \$1400.00 has been paid on this date by credit card.

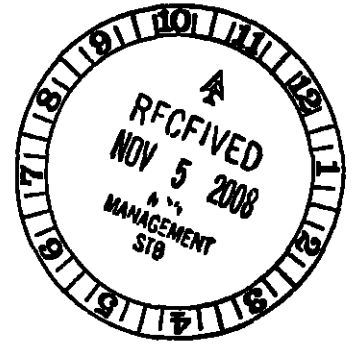
If you have any questions, please feel free to contact me at 757-629-2831.
Thank you for your prompt assistance.

Sincerely,

John M. Scheib

ENTERED
Office of Proceedings
NOV 5 - 2008
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Public Record

**UNITED STATES OF AMERICA
SURFACE TRANSPORTATION BOARD**



STB Finance Docket No. 35196

**PETITION FOR DECLARATORY ORDER
ON REFERRAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA**

**Crawford S. McGivaren, Jr.
Cabaniss, Johnston, Gardner,
Dumas & O'Neal LLP
2001 Park Place North
Suite 700
Birmingham, AL 35203**

**John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510**

***Counsel to Norfolk Southern
Railway Company***

Dated: November 4, 2008

Norfolk Southern Railway Company and The Alabama Great Southern Railroad Company (collectively and for brevity referred to as "NSR")¹ hereby petition the Surface Transportation Board for a declaratory order that the attempt by the City of Birmingham, Alabama, to condemn the NSR railroad property at issue is preempted by the Interstate Commerce Commission Termination Act of 1995 ("ICCTA"), 49 U.S.C. 10501(b).²

NSR submits that the law is clear that a city may not condemn railroad property for other conflicting uses, *City of Lincoln—Petition for Declaratory Order*, STB Finance Docket No. 34425, 2004 WL 1802302 (Aug. 11, 2004) ("*City of Lincoln*"), *aff'd*, *City of Lincoln v. Surface Transportation Board*, 414 F.3d 858, 862 (8th Cir. 2005), such as the creation of a park, even if such property is presently only used occasionally for railroad maintenance purposes. Therefore, NSR respectfully requests that the Board issue a declaratory order that the City of Birmingham's attempt to condemn NSR's railroad property is preempted by Section 10501(b).

¹ NSR is a subsidiary of Norfolk Southern Corporation. The property at issue is held in the name of The Alabama Great Southern Railroad Company, a wholly-owned subsidiary of NSR.

² Authority for the Board to issue this Petition for Declaratory Order is pursuant to 5 U.S.C. 554(e) and 49 U.S.C. 721

I. Procedural Background

The City of Birmingham initiated legal action against NSR in the Probate Court of Jefferson County, Alabama, by filing a Complaint for Condemnation seeking to obtain fee simple title to NSR's property for use "in connection with the Railroad Reservation Park." *See Appendix A (Complaint) at Article II.* In other words, the City seeks to take NSR's property, which is parallel to, immediately adjacent to, and at a lower grade than an elevated rail line (which is NSR's mainline through Birmingham) to create a park.

NSR removed this action on June 6, 2008, to the United States District Court for the Northern District of Alabama.

On July 9, 2008, the Court referred the case to the Surface Transportation Board to determine whether "ICCTA preempts Plaintiff City of Birmingham's condemnation action." *See Appendix B (Court Order).* The Court granted an extension of time until November 5, 2008, for the parties to file at the STB. Now, in accordance with the Court's order, NSR submits this Petition.

II. Factual Background

NSR objects to the City of Birmingham's attempt to condemn approximately 3.4 acres of NSR's real property held in fee, as well as certain other strips held by NSR by way of easement, to create a park. The City seeks to exercise its power of eminent domain to acquire the real property "in a fee simple [sic], free of any leasehold interests or rights of possession in or to the property". *Appendix A (Complaint) at Article IV.*

The property at issue extends four city blocks. Though not currently in use, the property contains track that formerly served an NSR produce depot. It is parallel to, immediately adjacent to, and at a lower grade than elevated rail lines. These rail lines consist of seven tracks, including two mainlines over which NSR moves between 25 and 30 trains per day, including both freight and Amtrak trains. The rail lines are held in place by a retaining wall. *See Appendix C (Smith Pictures), Appendix D (Benton Pictures), and Appendix E (Kerchof Pictures).* The City seeks to take by condemnation, not including additional railroad easements, fee property that extends from a property line (which is about two feet south of the retaining wall) 85 feet south and is approximately 1600 feet in length running westward from 18th Street and then narrows for a distance of 250 feet to a point at 14th Street in Birmingham, Alabama. *Appendix F (Verified*

Statement of James Causey (Exhibit 1) and Verified Statement of Wilfred U. Leaks (Exhibit 1)). The limited additional amount of property the City seeks to condemn is held by NSR by easement. *Id* NSR uses the property at issue to maintain the retaining wall and would need the property to construct an embankment if the wall ever needs to be replaced. The City seeks to take by condemnation this entire parcel from right next to the retaining wall extending outwards.

NSR has long used the property the City seeks to condemn. The major portion of the property was acquired by the railroad in the mid-1880s. Rail activity occurred on the property into at least the 1970s. Although a depot building on a portion of the property was leased to the Heart of Dixie Railroad Museum in the 1990s, the property has never been abandoned by the railroad. Today, railroad tracks remain on portions of the property, although the City began to tear them out without permission after filing its condemnation complaint. *See Appendix C (Smith Pictures), Appendix D (Benton Pictures), and Appendix E (Kerchof Pictures).*

Further, NS needs the property today and in the future. NS is currently in the process of replacing certain signal towers that serve the elevated track and the new signal structures will occupy a portion of the property the City seeks to condemn. NSR's long-term planning includes

use of the property to build an embankment rather than replace the existing retaining wall. Construction of that embankment would require the use of substantially all the property the City seeks to condemn *Appendix G (Verified Statement of James N. Carter, Jr.)*.

In addition, the line that adjoins the property is part of NSR's Crescent Corridor, which is a well-known project to expand rail infrastructure diagonally across the country from the Northeast (north New Jersey), through Birmingham, to New Orleans. In particular, pursuant to the Crescent Corridor project, the mainline adjacent to the property at issue would accommodate additional freight and passenger service between Birmingham and New Orleans and Mobile. The property the City seeks to condemn may well be needed to support the Crescent Corridor traffic depending on future rail volume.

The proximity of the proposed park to the active mainline tracks also poses serious operating, safety, and maintenance concerns. The property the City seeks to condemn is below and mere feet from the elevated, active rail lines. The City's plans for the park show an amphitheater and theatre next to the retaining wall. Those plans also show a walking trail and children's playground very near the retaining wall *Appendix H (City's Park Plan Schematic)*.

NSR recognizes the value of parks, and the City of Birmingham may have a noble objective. But, the City's recent desire to create a park next to an active railroad line is not entitled to any deference in this proceeding. *City of Lincoln*, at 6 ("We cannot simply accede to a public entity's wishes regardless of the transportation implications.") (citing *New York Cross Harbor R.R. v. STB*, 374 F.3d 1177 (D.C. Cir. 2004))

III. The City of Birmingham's Condemnation Action Clearly Is Preempted by ICCTA.

A. ICCTA Preemption Is Broad and Applies to State and Local Regulation of Railroad Property.

According to ICCTA, "transportation by rail carriers" is within the exclusive jurisdiction of the Surface Transportation Board, and state law burdening transportation by a rail carrier is preempted. Further, Congress broadly defined the term "transportation," which expressly includes "property." 42 U.S.C. §10102(9) ("Transportation" includes: "a locomotive, car, vehicle, vessel, warehouse, wharf, pier, dock, yard, **property**, facility, instrumentality, or equipment of any kind related to the movement of passengers or property, or both, by rail"). The City of Birmingham's attempt to condemn railroad property is precisely the type of state activity that can thwart transportation that Congress sought to preempt.

When it adopted ICCTA, Congress adopted an expansive preemption provision. The express terms of ICCTA demonstrate that Congress intended ICCTA to preempt state law. The Act provides, in pertinent part, as follows:

(b) The jurisdiction of the [STB] over --

(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules) practices, routes, services, and facilities of such carriers; and

(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,

is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

49 U.S.C. § 10501 (b).

Courts interpreting ICCTA have held that its language and legislative history dictate a broad preemptive reach. One Court observed that it “is difficult to imagine a broader statement of Congress’ intent to preempt state regulatory authority over railroad operations.” *City of Auburn v. United States*, 154 F.3d 1025, 1030 (9th Cir. 1998) (quoting *CSX Transp., Inc. v. Georgia Pub. Serv. Comm’n*, 944 F. Supp. 1573, 1581 (N.D. Ga. 1996)).

The Court further explained that “it is clear to the Court that Congress intended the preemptive net of the [ICCTA] to be broad by extending jurisdiction to the STB for anything included within the general and all inclusive term ‘transportation by rail carriers.’” *Id.* at 1582.

NSR is clearly a rail carrier. And the real property in question is clearly property. Section 10501(b) preemption applies.

B. State Condemnation of NSR’s Property Would Prevent or Unreasonably Interfere With Rail Operations.

Courts and the Board have already considered and decided that state condemnation is regulation that is generally preempted by Section 10501(b). Courts have held that Federal preemption can shield railroad property from state eminent domain law where the effect of the eminent domain law would have been to prevent or unreasonably interfere with railroad operations. In the Board’s decision in *City of Lincoln*, it found that “[c]ourts have held that condemnation can be a form of regulation, and that using state eminent domain law to condemn railroad property or facilities that are necessary for railroad transportation ‘is exercising control—the most extreme type of control—over rail transportation as it is defined in [49 U.S.C.] 10102(9).’” *City of Lincoln*, at 3; *see also Wisconsin Cent. Ltd. v.*

City of Marshfield, 160 F. Supp. 2d 1009, 1013 (W.D. Wisc. 2000) ("The Court holds that condemnation is regulation. . . . The City is impermissibly attempting to subject to state law property that Congress specifically put out of reach"). Nothing could be more invasive or a more permanent intrusion on rail corridors and the preservation of future capacity (in the form of railroad property) than condemnation. In *City of Lincoln*, the Eighth Circuit affirmed the Board's determination that the city's proposed easement for a bicycle and pedestrian trail was preempted by ICCTA, noting: "Condemnation is a permanent action, and it can never be stated with certainty at what time any particular part of a right of way may become necessary for railroad uses." *City of Lincoln v. Service Transportation Board*, 414 F.3d 858, 862 (8th Cir. 2005). NSR agrees.

Certainly, condemnation pursuant to state eminent domain laws is not universally preempted. *Lincoln Lumber Company—Petition for Declaratory Order—Condemnation of Railroad Right of Way for a Storm Sewer*, STB Finance Docket 34915, at 6 (Aug. 10, 2007) ("But neither the court cases, nor Board precedent, suggest a blanket rule that any condemnation action against railroad property is impermissible"). But condemnation of rail property is permissible for only "routine, non-conflicting uses, such as non-exclusive easements for at-grade road crossings, wire crossings, sewer

crossings, etc., . . . so long as they would not impede rail operations or pose undue safety risks.” *Maumee & Western Railroad Corporation and RMW Ventures, LLC* --Petition for Declaratory Order, STB Finance Docket No. 34354, slip op. at 2 (STB served Mar. 3, 2004) Therefore, condemnation for any use that conflicts with, prevents, or unreasonably interferes with railroad transportation is preempted.

The condemnation of the NSR property sought by the City of Birmingham is a complete condemnation for a conflicting use. It cannot be considered a non-conflicting use that does not prevent or unreasonably interfere with railroad transportation. The City does not seek to permit the railroad to continue to have rights to use the property for transportation purposes, as would be the case if it sought an easement to have a wire or sewer line traverse rail property. The City seeks to acquire the property “in a fee simple [sic], free of any leasehold interests or rights of possession to the property” to use the entire property for a non-transportation purpose. *Appendix A (Complaint) at Article IV*. Nothing could be more of a complete, conflicting use than using the property for a public park.

C. Condemnation Here Is Preempted for Similar Reasons that Condemnation Was Preempted In *City of Lincoln*.

City of Lincoln is a case that is very similar to this one. In that case, a Nebraska city sought a declaration from the STB that it could legally condemn a 20-foot wide strip of a railroad's right of way for a five-block distance for a recreational area with a bicycle and pedestrian trail. The STB held that ICCTA prevented the City's proposed condemnation because the proposed trail would unduly interfere with the railroad's operation in three ways. (1) it would prevent the railroad from constructing a spur or a rail-related terminal building in the future; (2) it would pose a safety hazard to the pedestrians and cyclists both via derailment and the loading and unloading of lumber and joints; (3) and because the trail would not leave sufficient room for equipment used to maintain track and clear derailments. *City of Lincoln*, at *4 ; see also *City of Creede, Co – Petition for Declaratory Order*, STB Finance Docket No. 34376, at 6 (May 3, 2005) (articulating the same three considerations).

These three issues arise here as well. First, similar capacity expansion problems are present in this case.

In the short term, NSR already has plans for converting the single direction running tracks into double direction from 14th Street interlocking

down to the Burstall control point. An important part of this project is the replacement of the signal bridge structure at MP 143.3. Because of the design of the modern structures and the massive physical size required, the foundation on the south side of the tracks must extend to the ground outside of the concrete retaining wall, i.e., within the property that the City of Birmingham seeks to condemn. The City's taking of the property would impede and impair NSR's rail operations as there is no room for the foundation of the signal bridge on the narrow strip of land on top of the wall.

Appendix C (Smith Pictures) - Verified Statement of Randall B. Smith.

In the longer term, the property at issue and the adjacent rail line is part of the Crescent Corridor. As is widely known, NSR has been working on this corridor concept for some time. The purpose of the project is to expand rail capacity along major highway corridors from New Orleans to the Northeast to promote greater use of and more efficient freight and passenger rail transportation. As rail traffic changes and grows, this property may be an integral part of expanding that Corridor.

Second, this case presents substantial safety concerns for pedestrians, concert goers, and children who might frequent the park. The City's plans show that an amphitheater and walking path will abut the retaining wall. *Appendix H (City's Park Plan Schematic).* The plans also

show playgrounds near the wall. Having park-goers this close to those active rail lines dramatically increases safety concerns. Although NSR seeks to avoid any railroad accident or derailment, if one were to occur at this location the consequences could be devastating if a locomotive, railcar, or railcars toppled over and fell down into an occupied park. Similarly, the danger to trespassers, who arguably would be more likely after construction of a public park, would be significant. Moreover, with hopes of having events that attract thousands of people, the park, without adequate safeguards to prevent incursion onto NSR's adjoining main line, accessible at the west end, by those curious, thoughtless, or impatient, creates a risk of accident not now present.

Third, the City's condemnation of the property would impair NSR's ability to maintain its present track structure. As shown in *Appendix C (Smith Pictures)*, *Appendix D (Benton Pictures)*, and *Appendix E (Kerchof Pictures)* the tracks here are elevated. For rail safety, NSR must maintain the "retaining wall," which NSR does via the property. Permitting the City to condemn this property would impede NSR's efforts to maintain the tracks, rail structure, and retaining wall. It would also prevent NSR from using other techniques to support the elevated tracks when the wall needs to be replaced. NSR's engineers have determined that the best engineering

design for the future is an embankment, which would require a substantial portion of the property the City seeks to condemn. *Appendix G (Verified Statement of James N. Carter, Jr.)*.

Accordingly, the Board's rationale in *City of Lincoln* compels an outcome that the City of Birmingham's attempt to condemn NSR's property is preempted here

D. Whether the Railroad Actively Uses the Property Presently Is Irrelevant.

The amount and frequency of railroad activity on the property today is irrelevant to the question of whether the City of Birmingham's attempted condemnation of railroad property is preempted by ICCTA. In *City of Creede*, the Board considered whether Section 10501(b) preempted state condemnation of rail property that was not being used at all (not even to maintain track). The Board held that "[m]any railroad lines have a wider [right-of-way] than might appear to be used, but that does not mean that all of the property is not needed for rail operations." The Board therefore concluded that: "[t]hus, it cannot be said that property at the edge of a railroad's ROW is 'not needed for railroad transportation' just because tracks or facilities are not physically located there now." *City of Creede, Co*

– *Petition for Declaratory Order*, STB Finance Docket No. 34376, at 15 (May 3, 2005) (citing *Midland Valley R.R. v. Jarvis*, 29 F.2d 539, 541 (8th Cir. 1928)). Accordingly, the Board held that the city “failed to show that the property was not now and will not likely be needed for rail purposes” and found that the city’s attempted condemnation was preempted.

The public policy that underlies this decision and *City of Lincoln* is that rail traffic may ebb and flow and the need for a railroad to use all its property may wax and wane, but the need to protect rail corridors for present and future transportation is constant. Indeed, because this is a known rail corridor with plans for significant improvement and rail traffic volume, the City’s condemnation would impede the ongoing efforts to increase freight rail capacity and forever sterilizes the property at issue for such use.

IV. Conclusion

In accordance with established precedent, NSR respectfully requests that the Board issue a declaratory order that the City of Birmingham’s attempt to condemn NSR’s railroad property is preempted by Section 10501(b).

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "John M. Scheib", is written over a horizontal line.

John M. Scheib
Norfolk Southern Corporation
Three Commercial Place
Norfolk, VA 23510

***Counsel to Norfolk Southern Railway
Company***

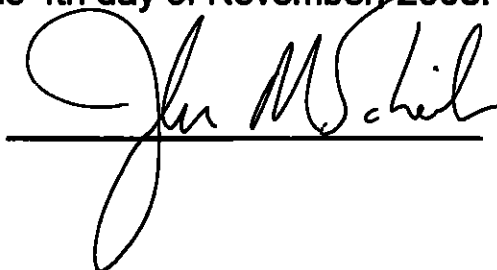
Dated: November 4, 2008

CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing on all parties to this proceeding, or their attorney of record, as follows:

Brandy Murphy Lee
Campbell, Gidiere, Lee, Sinclair &
Williams
2100A Southbridge Parkway,
Suite 450
Birmingham, AL 35209

by placing the same in the United States mail, first class postage prepaid and properly addressed this 4th day of November, 2008.

A handwritten signature in black ink, appearing to read "John M. Schil", is written over a horizontal line.

APPENDIX A – Complaint

IN THE PROBATE COURT OF JEFFERSON COUNTY, ALABAMA

CITY OF BIRMINGHAM

Plaintiff,

vs

BNSF RAILWAY COMPANY, CSX
TRANSPORTATION, INC., and
NORFOLK SOUTHERN RAILWAY
COMPANY, INC.; J.T. SMALLWOOD,
TAX COLLECTOR

Defendants.

- 2 0 0 4 5 4 - - 2

CASE NO.: _____

COMPLAINT FOR CONDEMNATION

COMES NOW, the City of Birmingham (hereinafter referred to as "Plaintiff"), and sets forth its Complaint for Condemnation against the above named defendants as follows:

ARTICLE I

That by virtue of the Constitution and the Laws of the State of Alabama, Plaintiff is authorized to exercise the power of eminent domain for the purpose of acquiring land for public use,

ARTICLE II

It is necessary and expedient in the public interest for Plaintiff to acquire, by the exercise of its power of eminent domain, fee simple title in and to the hereinafter described parcels of land in connection with the Railroad Reservation Park. See Resolution attached hereto as Exhibit A.

ARTICLE III

That by appointment by the Mayor of the City of Birmingham, and approval of said appointment by the Birmingham City Counsel, on November 13, 2007, Campbell, Gidiart, Lee, Sinclair & Williams, Attorney at Law, became empowered and authorized to render such legal services as required, including the institution and prosecution of this proceeding on behalf of the City of Birmingham in connection with the Railroad Reservation Park.

ARTICLE IV

The Plaintiff seeks to acquire by condemnation the following described real property in a fee simple, free of any leasehold interests or rights of possession in or to the property for the purposes set forth in Article II above:

Blocks 112A, 112B, 112C, 112D, 112E, 112F, 112G and 112H of Elyton Land Company's Survey of Birmingham, also Powell Avenue between the northeast line of 14th Street South and the southwest line of 18th Street South and also acreage lying northwest of said Blocks 112A, 112B, 112C and 112D, being in the SW 1/4 of Section 36, Township 17 South, Range 3 West, Jefferson County, Alabama, more particularly described as follows:

Begin at the south corner of said Block 112E, said corner being the intersection of the northwest line of 1st Avenue South and the northeast line of 14th Street South; thence run northeast along the said northwest line of 1st Avenue South, said line being the southeast line of said Blocks 112E, 112F, 112G and 112H, a distance of 1840.00 feet to the east corner of said Block 112H, said corner being on the southwest line of 18th Street South; thence angle left 90°00'27" and run northwest along the said southwest line of 18th Street South and a projection thereof, said line being the northeast line of said Blocks 112H and 112A, a distance of 445.97 feet to a point; thence angle left 89°59'53" and run southwest 3.50 feet to a point; thence angle right 89°59'53" and run northwest 5.38 feet to a point, thence angle left 89°59'53" and run southwest 1606.66 feet to a point; thence angle left 90°00'04" and run southeast 38.74 feet to a point; thence angle right 90°00'06" and run southwest 229.83 feet to a point on the northeast line of 14th Street South; thence angle left 90°00'06" and run southeast along said northeast line of 14th Street South, said line being the southwest line of said Blocks 112D and 112E, a distance of 412.43 feet to the Point of Beginning.

Contains 18.86 acres, more or less

A copy of a map of the subject property is attached hereto as Exhibit B

ARTICLE V

Plaintiff avers that the following named parties Defendant own, or are reputed to own, or to claim some right, title or interest in the subject real property, described above. To Plaintiff's knowledge and information, all named Defendants are over the age of nineteen (19) years and are of sound mind. The addresses where such Defendants may be found, and the interests they are reputed to have, are as follows;

<u>Name and address</u>	<u>Interest</u>
BNSF Railway Company 2650 Lou Menk Drive Ft. Worth, Texas 76131-2830	Claimed Owner
CSX Transportation, Inc c/o CSC Lawyers Incorporating SVC, Inc 150 South Perry Street Montgomery, AL 36104	Claimed Owner
Norfolk Southern Railway Company, Inc c/o Crawford S. McGivaren, Jr. 2001 Park Place North, Suite 700 Birmingham, AL 35203	Owner of Easement
J.T. Smallwood, Tax Collector Room 160 Jefferson County Courthouse 716 North Richard Arrington Jr. Blvd. Birmingham, AL 35203	Taxes

That the Attorney for the Plaintiff has, with reasonable diligence, attempted to ascertain the existence of any unknown claimants and the respective ownership or claimed ownership interest of said in the aforesaid tract of land, but has been unable to ascertain same.

ARTICLE VI

Plaintiff has provided the current owner of the property a written statement of the appraised amount and a brief summary showing the basis for the amount established as just compensation for the property, and did provide the owner with a written offer equal to the present value of the property interest involved prior to the filing of this Complaint in Condemnation.

ARTICLE VII

The City of Birmingham proposes to acquire the following items which it deems to be equipment or fixtures attached to or a part of the real estate: easement

ARTICLE VIII

The City of Birmingham requires the right to enter the remaining property to remove structures located partially thereon

WHEREFORE, THE PLAINTIFF PRAYS:

That upon the filing of this complaint, the Court enter an Order appointing a day for hearing of said complaint, within thirty (30) days, at which time, on the day appointed, or any other day to which the hearing may be continued the allegations of said complaint, any objections which may be filed to the granting thereof, and any legal evidence touching upon the same, and, within ten (10) days after such hearing, make an Order granting said complaint.

That the Court issue to each Defendant a copy of the complaint and Notice of the Day set for Hearing, service upon each Defendant of same to be made in accordance with Rule 4 of the Alabama Rules of Civil Procedure.

That if any Defendant is an infant, a person of unsound mind or unknown, the Court, on the day appointed for the hearing, appoint a Guardian Ad Litem to, after written acceptance of the appointment, appear and protect the rights and interests of such infant, person of unsound mind or unknown

That the Court, within ten (10) days after granting said complaint, appoint three (3) of citizens the county in which said lands sought to be condemned are situated, possessing the qualifications of jurors, who shall be disinterested, to act as Commissioners and immediately issue notice of said appointment; that said Commissioners file a certificate, along with their award, that neither of them had ever been consulted advised with or approached by any person in reference to the value of the land or the proceedings to condemn the same, prior to the assessment of damages and that they knew nothing of said prior to their appointment.

That the Commissioners, thus appointed, or a majority of them, assess separately the damages and compensation to which the owners and other parties interested in the tract of land are entitled; that the Commissioners, sworn as jurors are sworn, may view the land to be subjected and hold a hearing, after notice to all parties, to receive all legal evidence offered by any party touching the amount of damages the owners of the land and other parties interested therein will sustain and the amount of compensation they are entitled to receive, including damages based on the taking and entry onto the remaining land.

That the Commissioners, within twenty (20) days from their appointment, make a report in writing to the Court stating the amount of damages and compensation ascertained and assessed by them for the owners of said tract of land, or persons injured and other parties interested therein, and that within seven (7) days, the Court issue an Order that the report be recorded and the property condemned upon payment or deposit into the Court of the damages and compensation so assessed. That notice of entry of said Order and the amount of the award immediately be mailed by first class mail to each party whose address is known, together with a Notice of the Right to Appeal therefrom to the Circuit Court within thirty (30) days from the date of said Order.

That the Court grant the Plaintiff the right to enter the remaining property to remove structures located partially thereon.

That the Court grant such other, further or different relief as will cause to vest in Plaintiff good and merchantable title to said property, together with the right to possession, unencumbered by, and superior to the claims or rights of all parties made defendant to this action, upon payment or deposit into this Court by Plaintiff of the amount of just compensation fixed therefore

Plaintiff prays for such other and further relief as may be necessary or proper

Respectfully submitted,

Brandy Lee
Brandy Murphy Lee
Attorney for the Plaintiff

OF COUNSEL:
CAMPBELL, GIDIERE, LEE,
SINCLAIR & WILLIAMS
2100A Southbridge Parkway, Suite 450
Birmingham, AL 35209
Tel 205-803-0051
Fax 205-803-0053

STATE OF ALABAMA)
)
JEFFERSON COUNTY)

Before me, the undersigned Notary Public in and for said County, in said State, personally appeared Brandy Murphy Lee, who being known to me, and having been first duly sworn, deposes and says that she is an attorney for the State of Alabama, and as such is authorized to verify the foregoing complaint, and that the allegations of same are true and correct

Sworn to and subscribed before me this the 29th day of April, 2008.

Notary Public Susan Dietz Carver
My Commission Expires 04-05-09

A

fa12law28js r1

Recommended By: The Mayor

Submitted By: The City Attorney

RESOLUTION NO 168-08

WHEREAS, the City of Birmingham desires to develop a public park on the real property described below; and

WHEREAS, the City does not hold title to limited portions of the real property described below; and

WHEREAS, in the judgment of the City Council, it is necessary and expedient, and in the public interest, for a public use and public purpose that the City acquire, by contract, agreement or the exercise of its right of eminent domain, fee simple title in and to the limited portions of the real property described below to which it does not currently hold title, so that all of the below-described real estate may be used as a public park:

Blocks 112A, 112B, 112C, 112D, 112E, 112F, 112G and 112H of Elyton Land Company's Survey of Birmingham, also Powell Avenue between the northeast line of 14th Street South and the southwest line of 18th Street South and also acreage lying northwest of said Blocks 112A, 112B, 112C and 112D, being in the SW¼ of Section 36, Township 17 South, Range 3 West, Jefferson County, Alabama, more particularly described as follows:

Begin at the south corner of said Block 112E, said corner being the intersection of the northwest line of 1st Avenue South and the northeast line of 14th Street South; thence run northeast along the said northwest line of 1st Avenue South, said line being the southeast line of said Blocks 112E, 112F, 112G and 112H, a distance of 1840.00 feet to the east corner of said Block 112H, said corner being on the southwest line of 18th Street South; thence angle left 90°00'27" and run northwest along the said southwest line of 18th Street South and a projection thereof, said line being the northeast line of said Blocks 112H and 112A, a distance of 445.97 feet to a point; thence angle left 89°59'53" and run southwest 3.50 feet to a point; thence angle right 89°59'53" and run northwest 5.38 feet to a point; thence angle left 89°59'53" and run southwest 1606.66 feet to a point; thence angle left 90°00'04" and run southeast 38.74 feet to a point; thence angle right 90°00'06" and run southwest 229.83 feet to a point on the northeast line of 14th Street South;

thence angle left 90°00'06" and run southeast along said northeast line of 14th Street South, said line being the southwest line of said Blocks 112D and 112E, a distance of 412.43 feet to the Point of Beginning. Contains 18.86 acres, more or less

NOW, THEREFORE, BE IT RESOLVED by the Council of the City of Birmingham that the City Attorney, one of his assistants, and/or outside counsel retained by the City, be and hereby is authorized and directed to acquire, by contract or condemnation, fee simple title in and to those limited portions of the above-described property not currently owned by the City.

ADOPTED BY THE
CITY COUNCIL OF
BIRMINGHAM ON

February 12, 2008

APPROVED BY THE
MAYOR
ON

February 18, 2008

Paula R. Smith

CITY CLERK



APPENDIX B – Court Order

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

CITY OF BIRMINGHAM,

Plaintiff.

v.

BNSF RAILWAY COMPANY, et al.,

Defendants.

Case No. 2:08-cv-1003-RDP

ORDER

Before the court are Defendant Norfolk Southern Railway Company's Motion to Dismiss or, in the alternative, to Stay Action for Referral to the Surface Transportation Board (Doc # 8), filed on June 13, 2008, and Plaintiff City of Birmingham's Motion to Remand (Doc # 14), filed on June 23, 2008.

Consistent with the memorandum opinion entered this day, the court **REFERS** the case to the Surface Transportation Board to determine whether the ICCTA preempts Plaintiff City of Birmingham's condemnation action. The court **ORDERS** the parties to provide the Surface Transportation Board with a copy of this order and the memorandum opinion that accompanies it and to take all necessary steps to bring the referred issue before the Board.

The court **ORDERS** that the pending motions in this case be **ADMINISTRATIVELY TERMINATED** and the action **ADMINISTRATIVELY CLOSED** pending the Board's ruling on its jurisdiction. Furthermore, the court **ORDERS** the parties to notify the court of the status of proceedings before the Surface Transportation Board when the Board makes its ruling or after ninety (90) days have passed from the entry of this order, whichever comes first. If the Surface

Transportation Board does not assert jurisdiction over this dispute, upon an appropriate and timely motion, the court will reopen this case for the limited purpose of remanding this action to the state court.

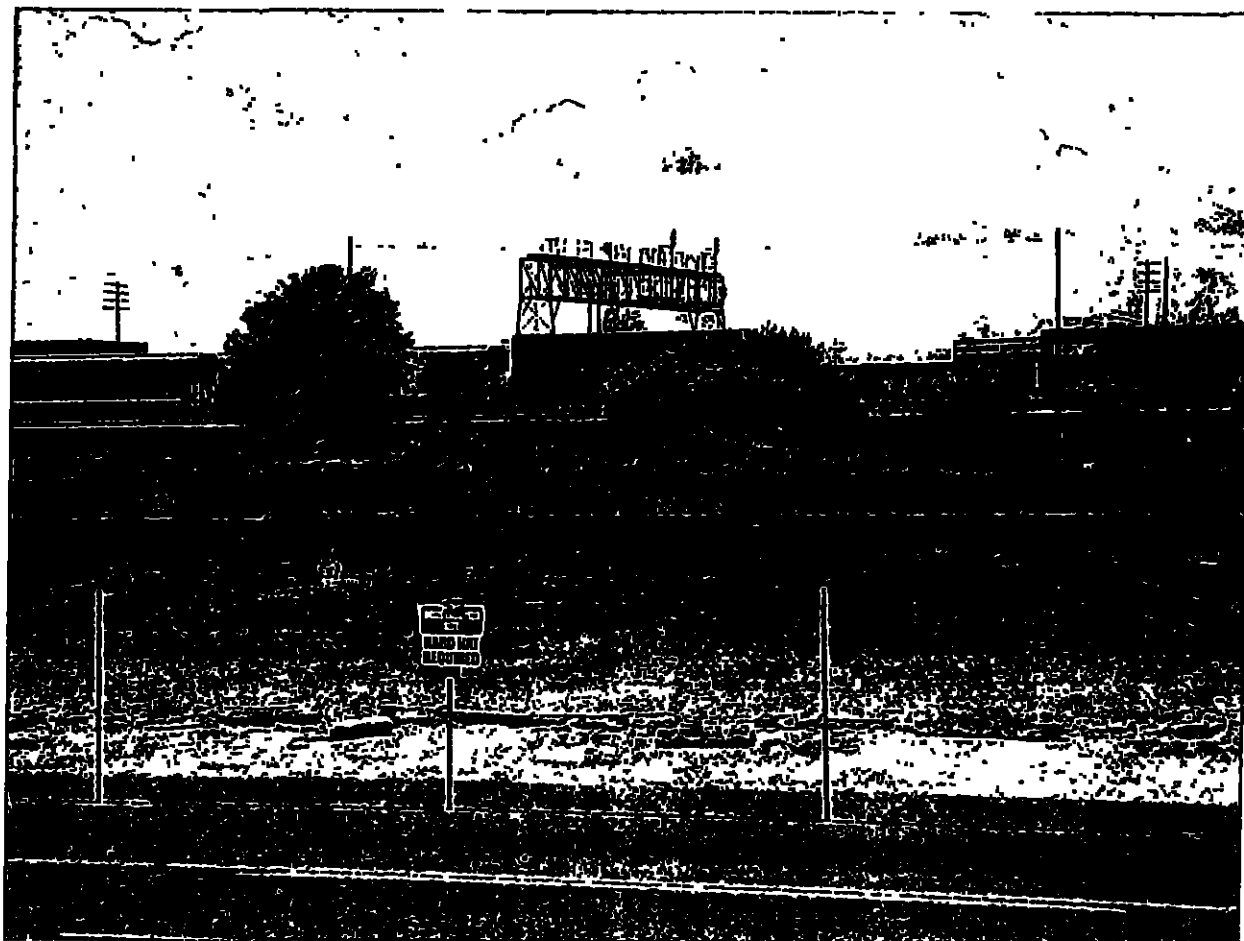
DONE and ORDERED this 8th day of July, 2008.

A handwritten signature in black ink, appearing to read 'R. David Proctor', written over a horizontal line.

R. DAVID PROCTOR
UNITED STATES DISTRICT JUDGE

APPENDIX C – SMITH PICTURES

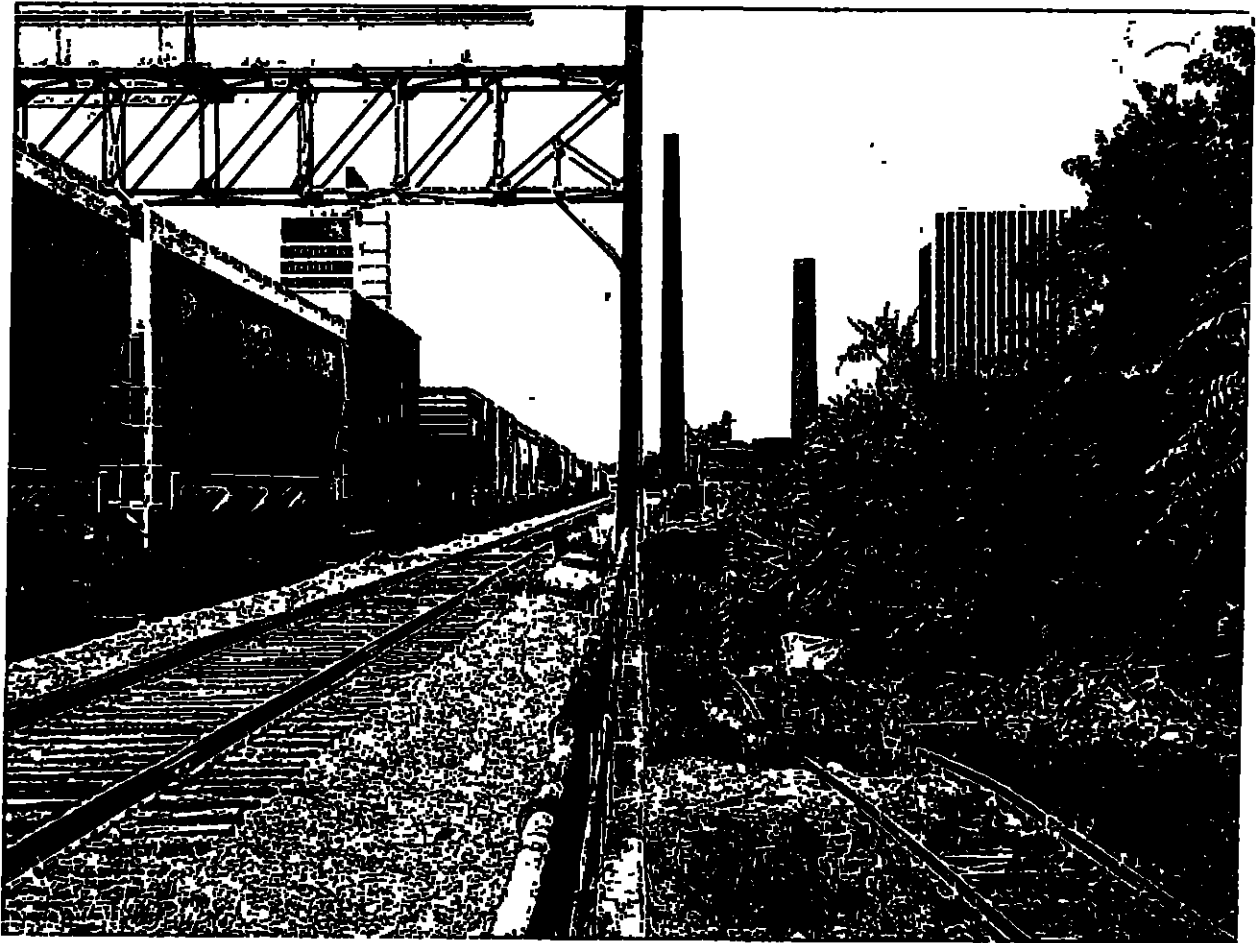
Property near 14th Street



Retaining wall and track on property near 14th Street



Picture of property at 14th Street from on top of the retaining wall.



STB Finance Docket No. 35196

VERIFICATION OF RANDALL B. SMITH

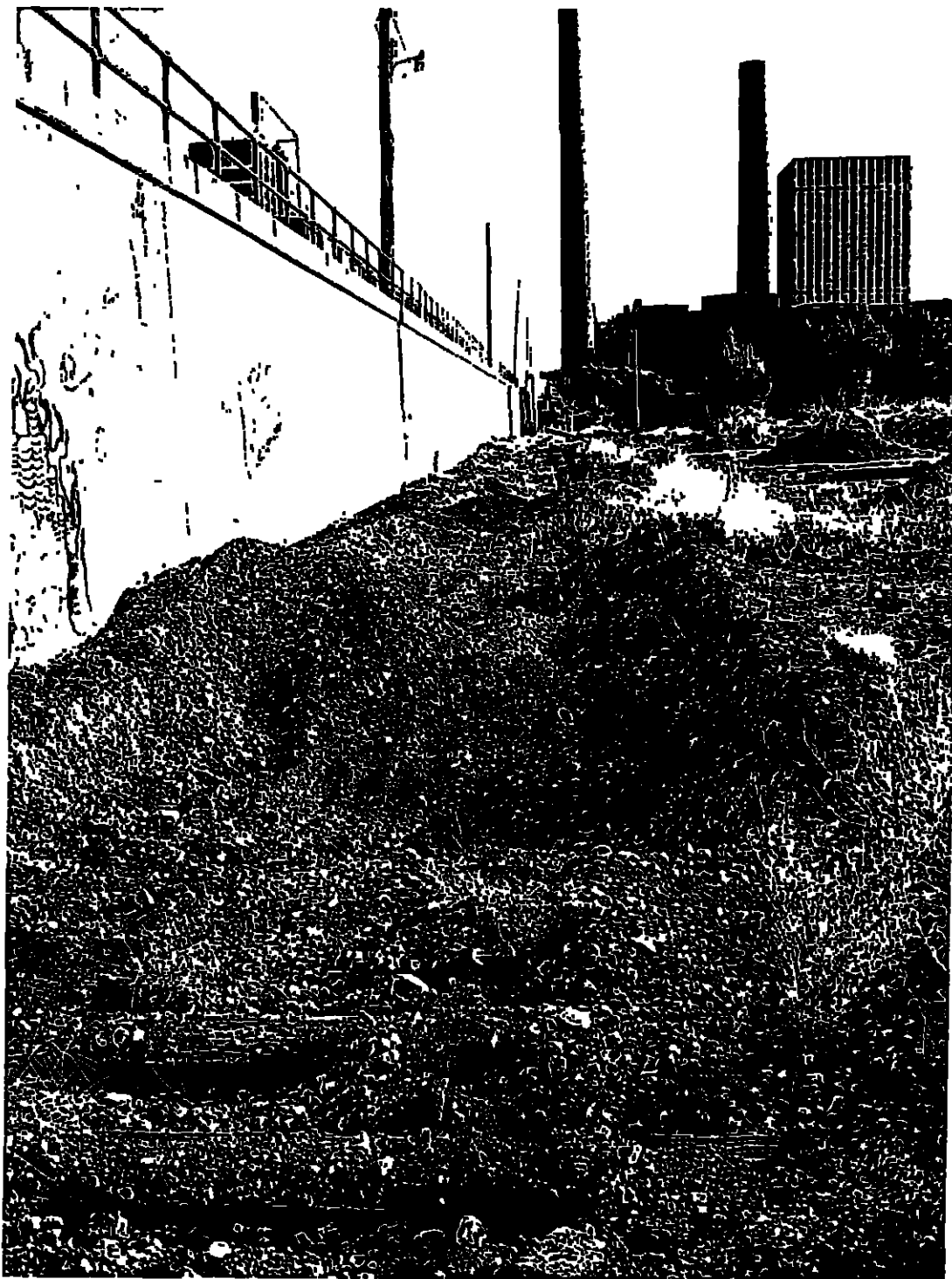
My name is Randall B. Smith, and I am General Supervisor in Birmingham, Alabama. I hereby certify that I took the pictures included as Appendix C on June 26, 2008, and that they are true and correct.

I further certify that NS is in the process of converting the single direction running tracks into double direction from 14th Street interlocking down to the Burstall control point, which includes replacing the signal bridge structure at MP 143.3. Because of the design of the modern structures and the massive physical size required, the foundation on the south side of the tracks must extend to the ground outside of the concrete retaining wall. Accordingly, the structure will be on the property that the City of Birmingham seeks to condemn because there is no room for the foundation of the signal bridge on the narrow strip of land on top of the wall.

RB Smith

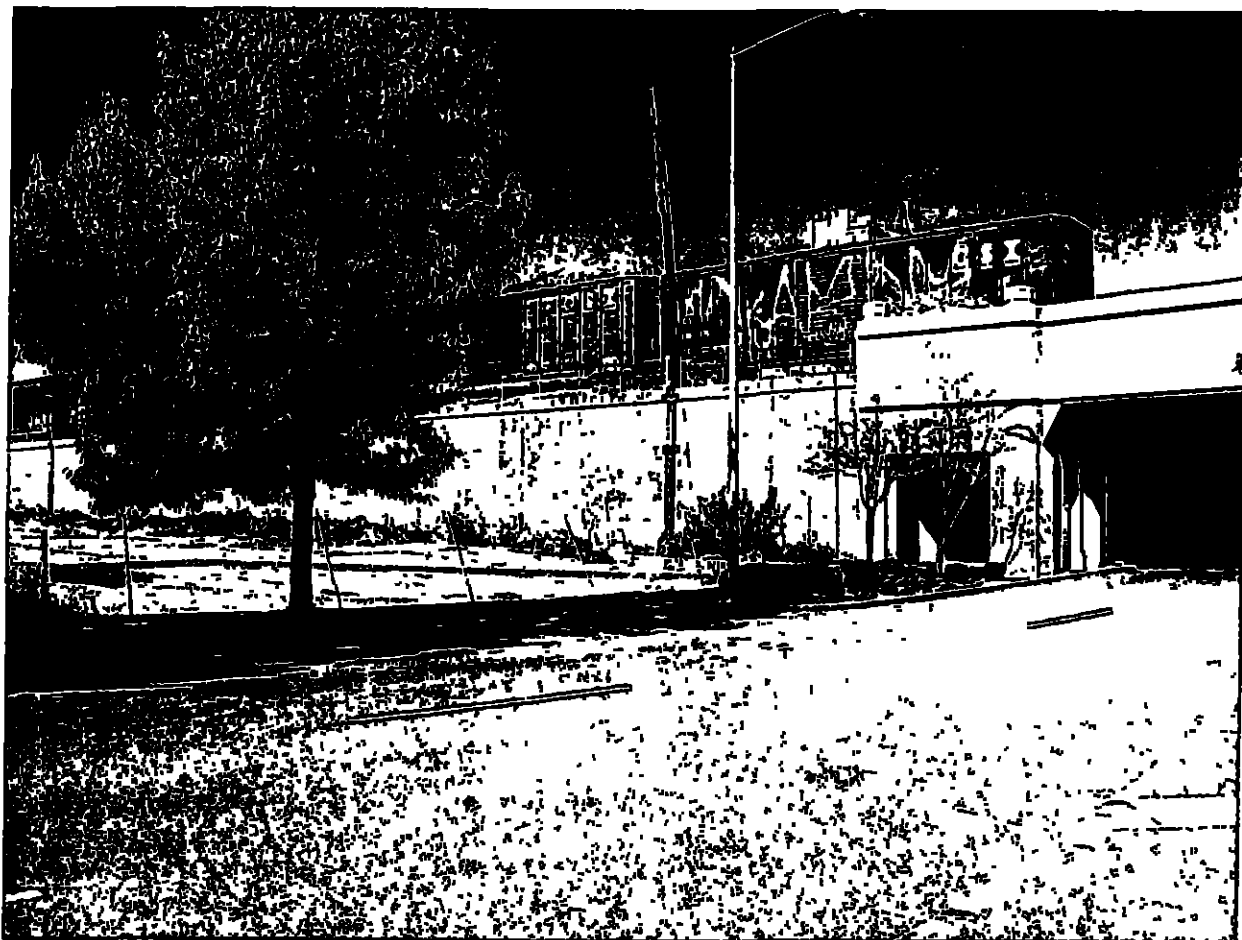
Appendix D—BENTON PHOTOGRAPHS

This picture shows the retaining wall with a cut of cars on the track above and the earth that the City of Birmingham had begun to dig.



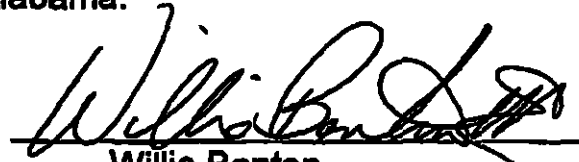
STB Finance Docket No. 35196

This picture shows the wall with a cut of cars near the 18th Street overpass in Birmingham, Alabama.



VERIFICATION OF PHOTOGRAPHS

My name is Willie Benton, and I am Engineer Structures, West at Norfolk Southern and am based in Atlanta, Georgia. I hereby certify that I took the pictures included as Appendix D on October 22, 2008 and that they are true and correct representation of the area. The first picture shows the retaining wall with a cut of cars on the track above. It also shows the earth that the City had begun to dig. The second picture shows the wall with a cut of cars near the 18th Street overpass in Birmingham, Alabama.

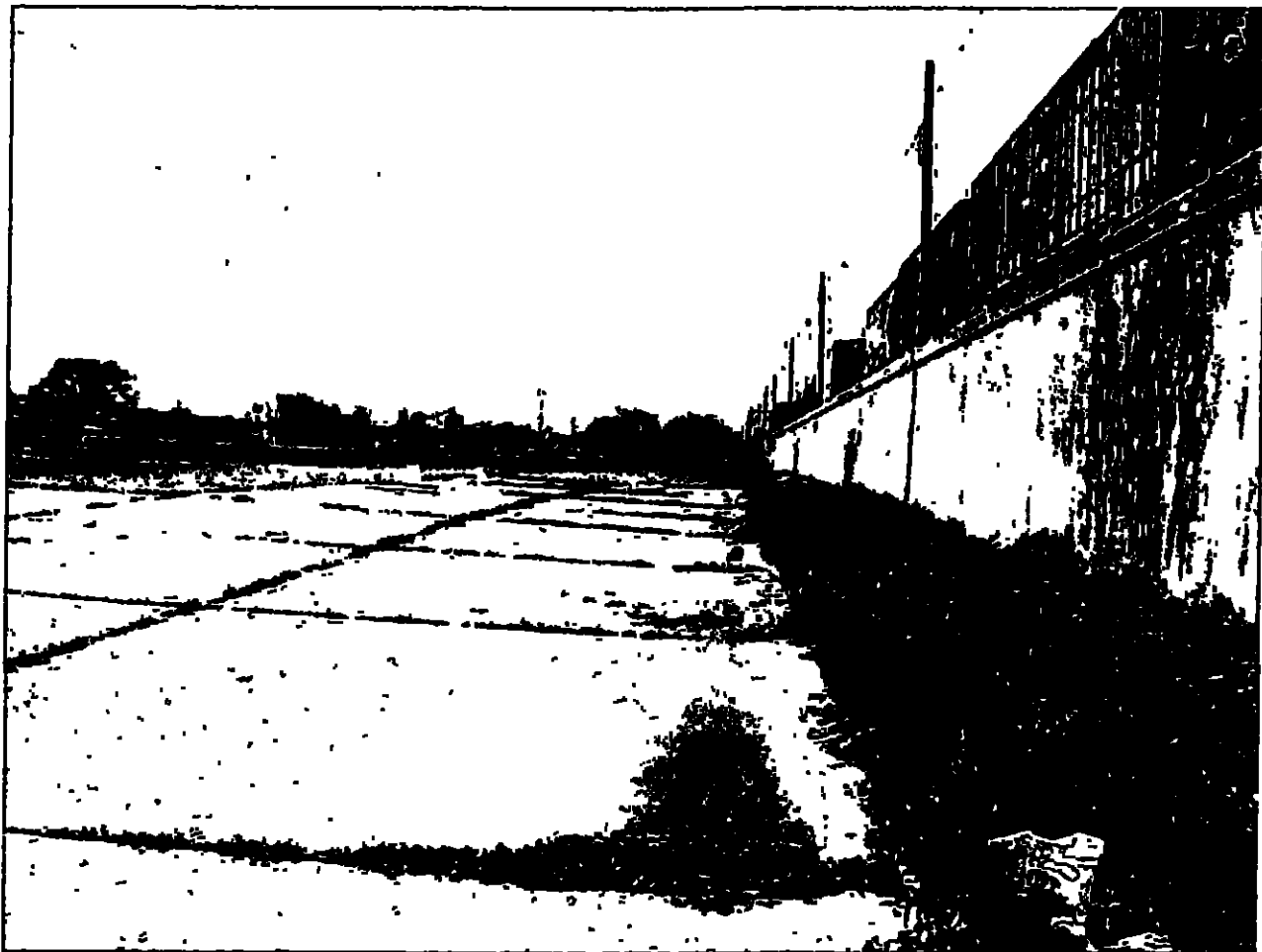


Willie Benton

November 3, 2008

Appendix E—KERCHOF PICTURES

Looking west along NS's retaining wall from the 18th Street end.



Looking west from the 18th Street end; this track lies between the retaining wall and Powell Avenue.



Standing at the 14th St end looking east, toward 18th Street.



STB Finance Docket No. 35196

VERIFICATION OF PHOTOGRAPHS

My name is W Braden Kerchof, and I am Division Engineer for Norfolk Southern in Birmingham, Alabama. I hereby certify that I took the pictures included as Appendix E on April 11, 2008, and that they are a true and correct representation of the area.

A handwritten signature in black ink, appearing to read 'W Braden Kerchof', written over a horizontal line.

W Braden Kerchof

November 4, 2008

Appendix F – Verified Statements of Mssrs. Causey and Leaks

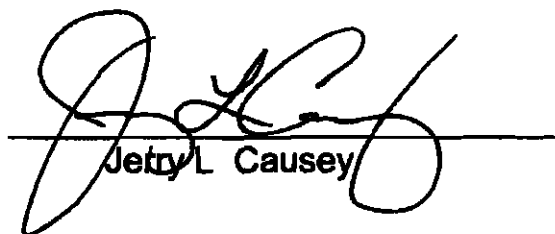
VERIFICATION OF JERRY L. CAUSEY

My name is Jerry L. Causey, and I am General Attorney – Real Estate at NSR (as that term is used in the Petition in STB Finance Docket No. 35196).

The City seeks to take by condemnation, not including additional railroad easements, fee property that extends from a property line (which is about two feet south of the retaining wall) 85 feet south and is approximately 1600 feet in length running westward from 18th Street and then narrows for a distance of 250 feet to a point at 14th Street in Birmingham, Alabama, as shown on Exhibit 1. The fee property in question is shown highlighted in yellow on the map attached to this verified statement as Exhibit 1 and entitled "Station Map: Alabama Great Southern R R Co " The limited additional amount of property the City seeks to condemn is held by NSR by easement and is shown highlighted in yellow in the second map attached to this verified statement as Exhibit 2.

I, Jerry L. Causey, hereby certify that I have searched NSR's real estate records and, as a result of that search, such records show (i) that NSR (as that term is used in the Petition in STB Finance Docket No. 35196) owns the property shown on Exhibit 1 in fee simple and (ii) that the limited remainder of the property the City seeks to condemn as shown on Exhibit 2 is held by NSR as easement right of way.

I, Jerry L. Causey, make this certification under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this certification document. Executed on November 4, 2008

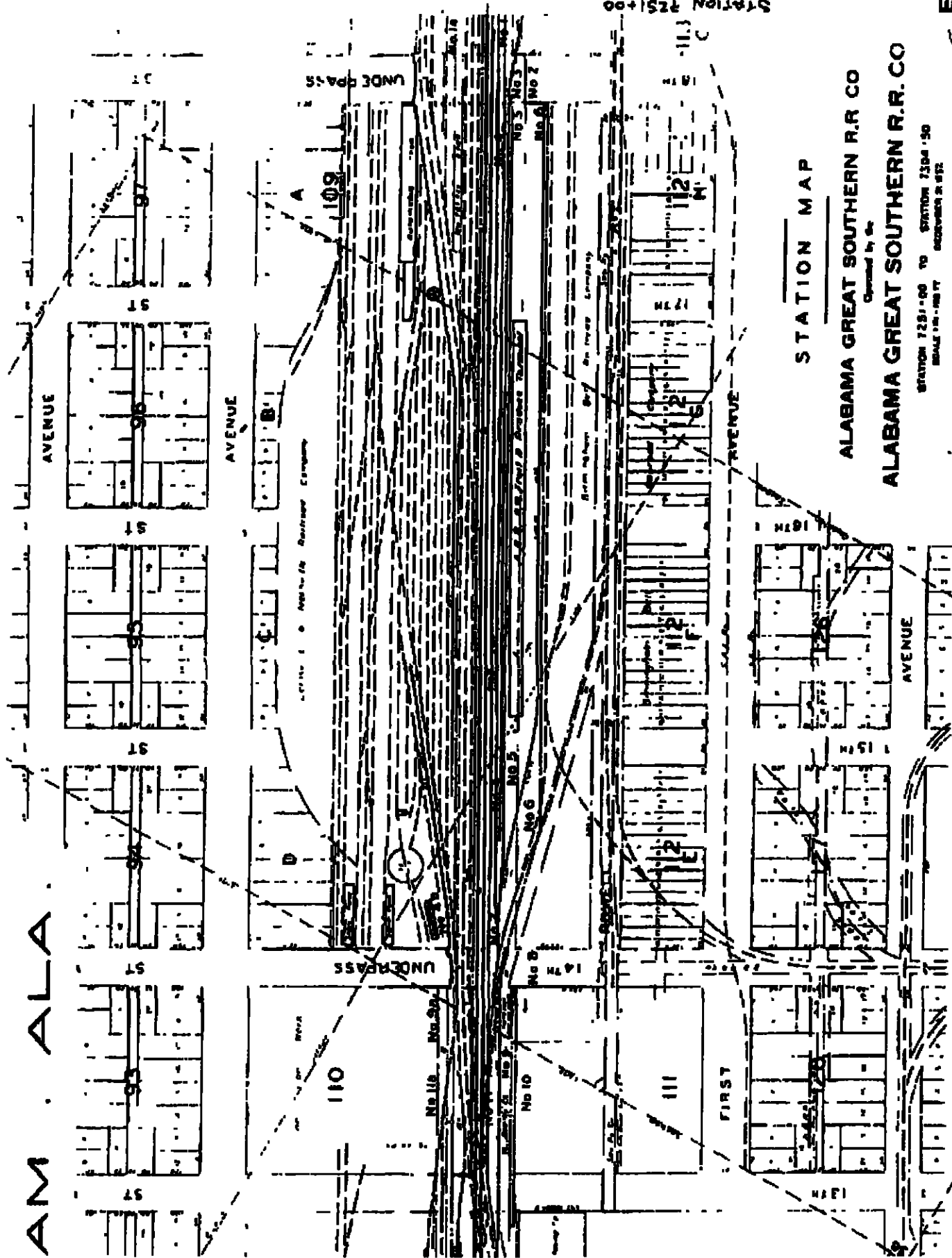


A handwritten signature in black ink, appearing to read "Jerry L. Causey", is written over a horizontal line. The signature is stylized with large loops and a long horizontal stroke extending to the right.

November 4, 2008

COUNTY . ALA .

AM . ALA .



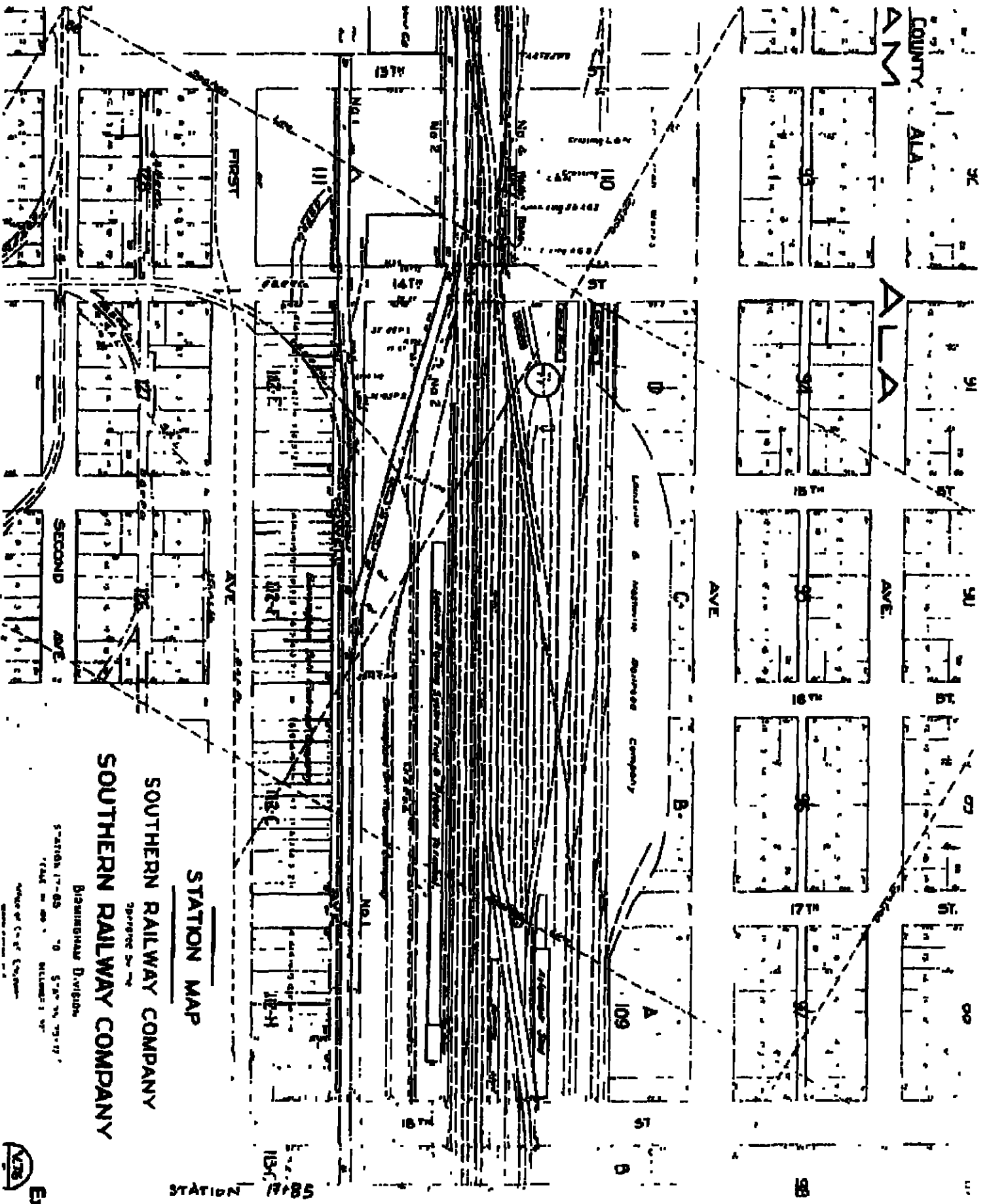
STATION MAP

ALABAMA GREAT SOUTHERN R.R. CO
Owned by the
ALABAMA GREAT SOUTHERN R.R. CO

STATION 7251+00 TO STATION 7304+50
SCALE 1" = 100 FT
REVISIONS IN 1922

Office of Chief Engineer
Birmingham, Ala.

Exhibit 1



STATION MAP
 SOUTHERN RAILWAY COMPANY
 BIRMINGHAM DIVISION
 SOUTHERN RAILWAY COMPANY

STATION 17-05 70 57-00 75-17
 (Scale in feet) DISTANCE 1 mi.
 (Scale of 1 in = 1 mi.)

VERIFICATION OF WILFRED U. LEAKS

My name is Wilfred U. Leaks, and I am Engineer – Real Estate at NSR (as that term is used in the Petition in STB Finance Docket No 35196).

The City seeks to take by condemnation, not including additional railroad easements, fee property that extends from a property line (which is about two feet south of the retaining wall) 85 feet south and is approximately 1600 feet in length running westward from 18th Street and then narrows for a distance of 250 feet to a point at 14th Street in Birmingham, Alabama, as shown on Exhibit 1. The fee property in question is shown highlighted in yellow on the map attached to this verified statement as Exhibit 1 and entitled "Station Map: Alabama Great Southern R.R Co." The limited additional amount of property the City seeks to condemn is held by NSR by easement and is shown highlighted in yellow in the second map attached to this verified statement as Exhibit 2

I, Wilfred U. Leaks, hereby certify that I have searched NSR's engineering and real estate records and, as a result of that search, such records show that the NSR (as that term is used in the Petition in STB Finance Docket 335196) property interests reflected in the deeds are properly outlined in yellow on the maps attached as Exhibits 1 and 2.

I, Wilfred U. Leaks, make this certification under penalty of perjury that the foregoing is true and correct. Further, I certify that I am qualified and authorized to file this certification document. Executed on November 4, 2008



Wilfred U. Leaks

November 4, 2008

ΣΔ

ENVY

STATION MAP

ALABAMA GREAT SOUTHERN R R CO

老幼咸宜

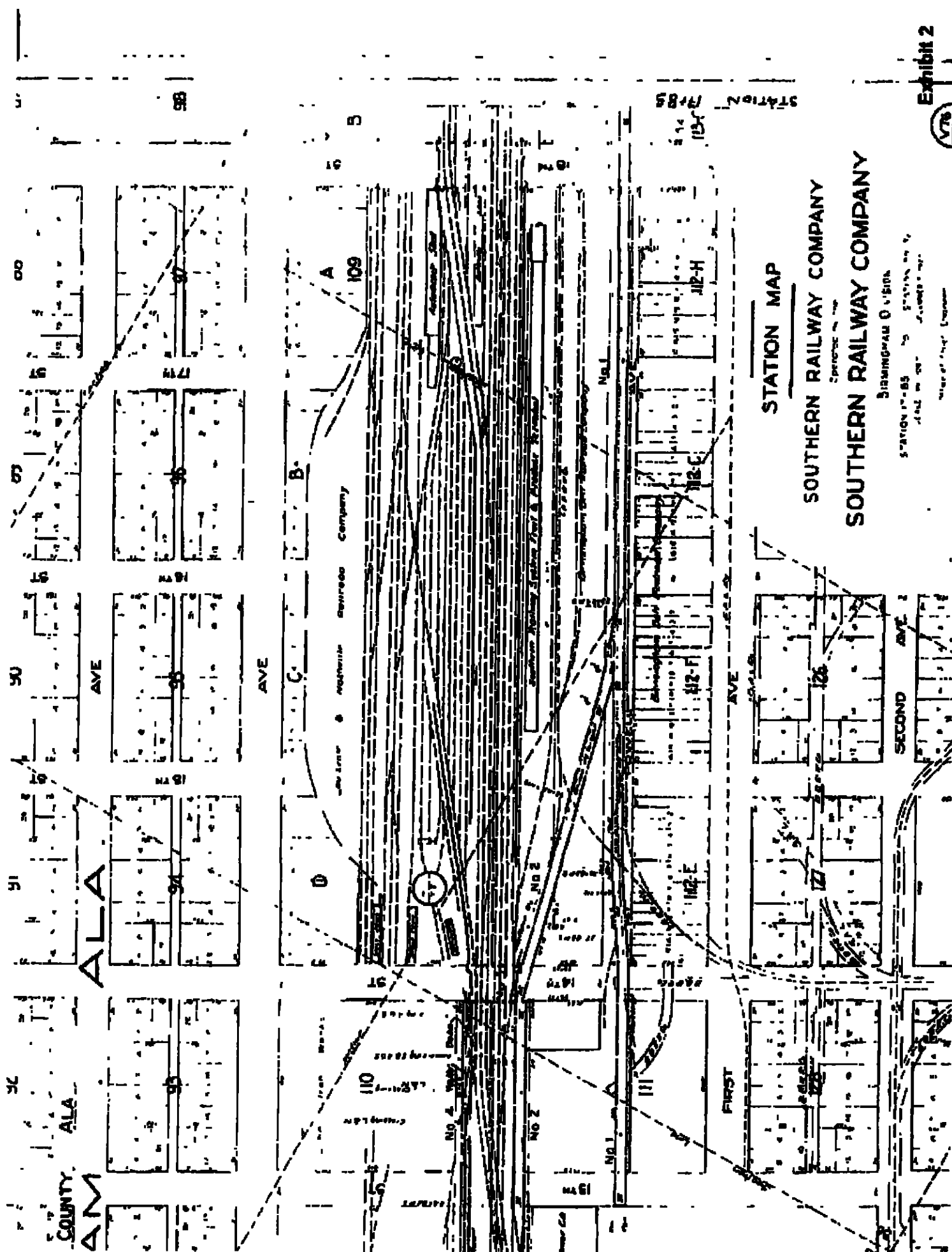
ALABAMA GREAT SOUTHERN R.R. CO.

STATION 725-00 TO STATION 104-50
 05-0011 MONDAY 02-11-68

Office of Chief Counsel

Exhibit 1

W2A3



STATION MAP

SOUTHERN RAILWAY COMPANY

SOUTHERN RAILWAY COMPANY

BIRMINGHAM, ALA.

STATION 17-85 to 17-86
17-85 to 17-86

Appendix G – Verified Statements of Mr. Carter

VERIFIED STATEMENT OF JAMES N. CARTER, JR.

My name is James N. Carter, Jr., and I work in Norfolk Southern Corporation's Engineering Department as Chief Engineer Bridges and Structures. I have reviewed plans of the retaining wall located next to the property that is held in the name of The Alabama Great Southern Railroad Company, a wholly-owned subsidiary of Norfolk Southern Railway Company ("NSR"), and that the City of Birmingham, Alabama, seeks to condemn ("Property").

At some points along the Property, the wall measures between 15 and 20 feet in height. From an engineering perspective the preferred method of replacing the wall would be to widen the existing embankment. The widened embankment would extend outward horizontally 15 feet from the centerline of the track closest to the wall then out two feet every one foot in height. This design would provide the stability needed for the track structure.

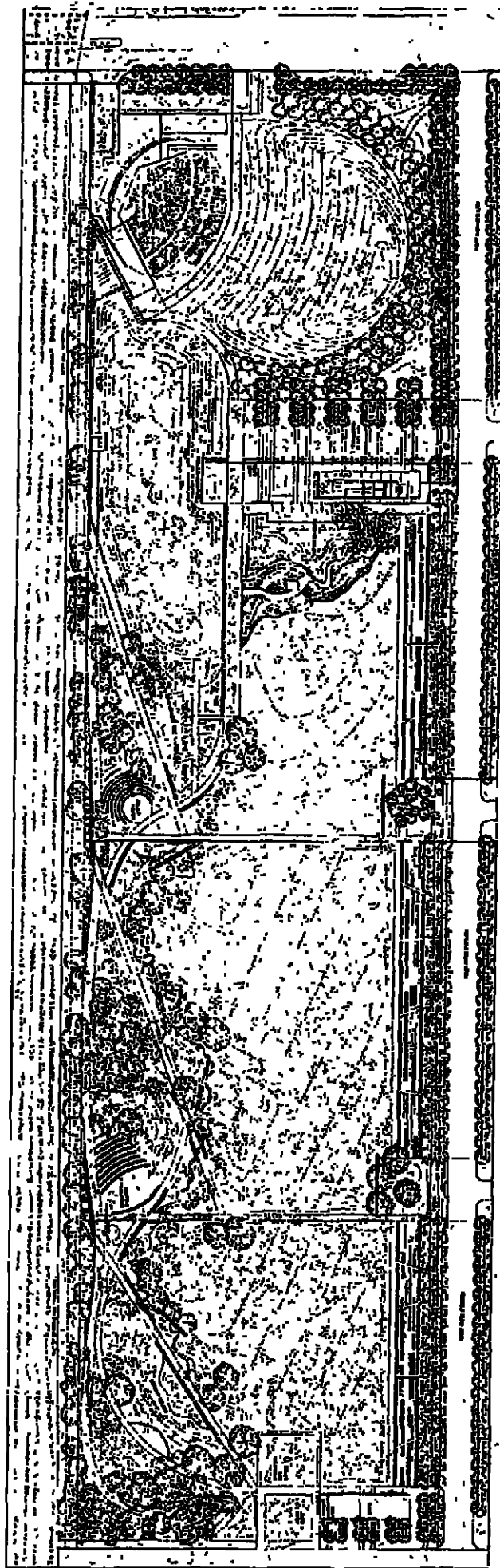
A handwritten signature in black ink, appearing to read 'J. N. Carter', is written over a horizontal line.

James N. Carter, Jr.

September 16, 2008

Appendix H -- City's Park Plan Schematic

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RAILROAD PARK Birmingham, Alabama
ILLUSTRATIVE SITE PLAN